MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW SCHOOL OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 50 CENTS PER NUMBER

NOTE AND COMMENT

ATTORNEY'S INTEREST IN HIS CASE UNDER A CONTRACT FOR CONTINGENT FEES.—Absolute protection for an attorney who has given services in a cause wherein he runs the risk of receiving no compensation for his efforts would require that he be considered as having an equitable assignment of the specified percentage of the judgment from the filing of the first paper, and that he have the right to carry the case through to final judgment, on his own behalf, any desire of his client to discontinue, dismiss or compromise to the contrary notwithstanding. On the other hand, the courts frequently say that the client should have a maximum power of control of his case at all times, and that compromise should be actively favored, as a matter of public policy. There is authority for almost every conceivable position between these extremes.

While an agreement to assist in the prosecution of a criminal charge for a fee contingent upon conviction is invalid as against public policy, *Baca* v. *Padilla* (N. M., 1920), 190 Pac. 730, and formerly any contract to carry on a civil action for a contingent fee was bad, as champertous, *Elliott* v. *McClelland,* 17 Ala. 206; *Slade* v. *Rhodes,* 22 N. C. 24; *Ackert* v. *Barker,* 131 Mass. 436, at the present time it is very generally held that if there is no fraud or undue influence at the making of such contract, it is valid.

However, in some few jurisdictions it must not expressly appear in the contract that the attorney's services are to be gratuitous in case of failure. 2 THORNTON, ATTORNEYS AT LAW, 667. Generally the attorney must not agree to pay the costs of the suit, *Kelly* v. *Kelly*, 86 Wis. 170, but to the effect that this can sometimes be done, see *Hassell* v. *Van Houten*, 39 N. J. Eq. 105; *Brown* v. *Bigne*, 21 Ore. 260; *Bentinck* v. *Franklin*, 38 Tex. 458. See, also, 10 MICH. L. REV. 490. If, as part of the contract, the client agrees that he will not settle or compromise without the attorney's consent, the whole contract will be held bad as champertous, *Davy* v. *Fidelity & Casualty Ins. Co.*, 78 Ohio St. 256; *Davis* v. *Webber*, 66 Ark. 190; *Davis* v. *Chase*, 159 Ind. 242, or the contract will be divided, and the agreement not to compromise only held void. *Granat* v. *Kruse*, 114 Ill. App. 488; *Potter* v. *Ajax Min. Co.*, 22 Utah 273. In a few instances the courts have indicated that the whole contract was valid. *Hoffman* v. *Vallejo*, 45 Cal. 564; *Taylor* v. *St. Louis Transit Co.*, 198 Mo. 715; *Smits* v. *Hogan*, 35 Wash. 290. An agreement that if the client should settle without the attorney's consent the attorney should receive a stipulated amount has been held valid. *Syme* v. *Terry & Tench Co.* (N. Y.), 125 App. Div. 610. See *Hall* v. *Orloff* (Cal. App., 1920), 194 Pac. 296, *contra*. To the effect that an agreement not to compromise may or may not be good, according to the good or bad faith of the parties, see *Lipscomb* v. *Adams*, 193 Mo. 530. An agreement for contingent fees in a divorce suit is void, as it is against public policy to create any obstacle to settlement of the marital differences. *McCurdy* v. *Dillon*, 135 Mich. 678; *McConnell* v. *McConnell*, 98 Ark. 193.

If we start, then, with a valid contract between attorney and client that the former will conduct the case either for a certain percentage of the fruits of the litigation, or for a sum certain, contingent upon success, we have the questions, what right or interest has the attorney in the cause of action, and what can he do if the client seeks to dismiss, discontinue or compromise without his consent and in disregard of his rights. Aside from special statutory provisions, his rights are fixed by the retaining lien, the charging lien and the doctrine of equitable assignment.

The retaining lien is a product of the common law, may be general or particular, depends upon possession, is not assignable and is passive only. 2 THORNTON, ATTORNEYS AT LAW, 970. Changes by recent statute have been comparatively slight. Its application in the case of a contingent fee contract is governed by the same rules as in case of a contract for a fixed and certain fee.

The charging lien is the product of statute and judicial legislation, is particular only, does not depend upon possession, is sometimes assignable, and can be actively enforced. It is equitable in nature, and is, in a way, the arbitrary exercise of power by the court for the protection of its officer, the attorney. 2 THORNTON, ATTORNEYS AT LAW, 975. Changes by recent statute have been great and varied. To draw from the cases any definite general rules as to the extent of the protection thus given the attorney is extremely difficult, not only because of these varied statutes, but also because the courts frequently fail to make it clear whether the compromise without

the consent of the attorney occurred before verdict, between verdict and the entry of judgment, or pending an appeal after entry of judgment, and also because the courts very generally fail to make proper distinction between the charging lien and the doctrine of equitable assignment. It is frequently impossible to determine from an opinion whether it rests upon the one theory or the other, or a mixture of the two. As is very ably pointed out in *Nichols* v. *Orr,* 63 Colo. 333, the two doctrines should be distinct. Property charged with a lien can be sold subject to the lien; under equitable assignment it can be sold only with the consent of the assignee. A lien is a charge *upon* property; an equitable assignment gives an interest *in* the property. It was said in *Gillette* v. *Murphy,* 7 Okla. 91, where the attorney claimed both an equitable assignment and a lien, that these two claims were inconsistent. Under the charging lien theory the attorney may have a lien upon the judgment secured in the cause or upon the compromise settlement; under the equitable assignment theory he should have an interest in the cause of action and in the fruits of litigation. He can always intervene when necessary to protect his interest under an equitable assignment; he is sometimes permitted to intervene to protect his lien. *Payton* v. *Wheeler,* 13 Ga. App. 326.

To notice some of the more important rulings regarding the charging lien, in the absence of a special statute providing to the contrary, the lien does not attach until after judgment. *Jackson* v. *Stearns,* 48 Ore. 25; *Hanna* v. *Island Coal Co.,* 5 Ind. App. 163; *Coughlin* v. *N. Y. C. & H. R. Co.,* 71 N. Y. 443 (a case much cited and often followed, but no longer accurately representing New York law, because of statutes); *Kusterer* v. *Beaver Dam,* 56 Wis. 471; *Henchey* v. *Chicago,* 41 Ill. 136; *Hutchinson, Adm'r,* v. *Pettes,* 18 Vt. 614; *In re Baxter & Co.,* 154 Fed. 22. But there are now several statutes, nearly all of recent date, under which it has been held that the lien attaches upon institution of the suit. *Payton* v. *Wheeler,* 13 Ga. App. 326; *Robertson & Cleary* v. *Shutt,* 72 Ky. 6659; *Peri* v. *N. Y. C. R. Co.,* 152 N. Y. 521; *Broadbent* v. *Denver & R. G. R. Co.,* 48 Utah 598; *Wait* v. *Railroad,* 204 Mo. 491. While in *Farmer* v. *Stillwater Water Co.,* 108 Minn. 41, it is said that the charging lien attaches upon verdict, this is denied in *Tyler* v. *Superior Court,* 30 R. I. 107, and *Cline Piano Co.* v. *Sherwood et al.,* 57 Wash. 239, where it is held that the lien does not attach until judgment is entered. So far as the charging lien is concerned, under an ordinary statute (if there be such a thing) it would seem that the client can settle out of court and stop the suit at any time, but if the lien has attached it will be protected. But if the settlement was collusive and in fraud of the attorney's rights, some courts have been inclined to follow the suggestion in *Coughlin* v. *N. Y. C. & H. R. Co., supra,* and, ignoring logic and the theoretical limitations of the lien, they have exercised an arbitrary and undefined power and have prevented the client from dismissing or discontinuing even before the lien has attached. *Jackson* v. *Stearns,* 48 Ore. 25; *National Exhibition Co.* v. *Crane* (N. Y.), 54 App. Div. 175. If the compromise occurs before the lien has attached, no collusion being shown, the attorney can recover

the reasonable value of his services on a *quantum meruit*. *Badger* v. *Mayer*, 2 Misc. Rep. 533; *Re Winkler*, 139 N. Y. Supp. 755.

When the compromise occurs after the lien has attached, it must be determined what it attaches to—the judgment, if there be one, or the settlement. In many jurisdictions the attorney is entitled to the agreed percentage of the settlement only, *Barcus* v. *Gates*, 130 Fed. 364 (affirmed, 136 Fed. 184), and he is not entitled to the reasonable value of his services in the place thereof. *Crosby* v. *Hatch*, 155 Iowa 312. But to the effect that he is entitled to the agreed percentage of the judgment, especially if the settlement was collusive, see *Desaman* v. *Butler Bros.*, 118 Minn. 198. In some courts the matter turns upon whether the judgment is final or not. If it is, then the attorney is entitled to the agreed percentage of the judgment, *Chreste* v. *Louisville R. Co.*, 167 Ky. 75; *Serwer* v. *Sarasohn*, 86 N. Y. Supp. 838; if it is not, but an appeal is pending, then the amount of the settlement controls. *Corcoran* v. *Geo. Kellogg Structural Co.*, 166 N. Y. Supp. 269; *Stephens* v. *Metropolitan St. R. Co.*, 157 Mo. App. 656.

If the contract was for a fixed sum, contingent upon success, the attorney may recover only the reasonable value of his services when a compromise occurs before final judgment, *Pratt* v. *Kerns*, 123 Ill. App. 86, but in other jurisdictions apparently he can recover the amount stipulated for. *Hall* v. *Gunter*, 157 Ala. 375; *Ingersoll* v. *Coram*, 211 U. S. 335.

If, in the compromise agreement, the opponent agrees to pay the attorney's fees for the client, there is a nice question as to whether the attorney's percentage is to be reckoned on the basis of the amount paid the client or on the basis of the sum total which the opponent must pay attorney and client together. *Schmitz* v. *S. Covington & C. St. R. Co.*, 131 Ky. 207; *Neu* v. *Brooklyn Heights R. Co.*, 99 N. Y. Supp. 290, hold that it is the former; *Sutton* v. *Chicago R. Co.*, 258 Ill. 551; *Johnson* v. *Great Northern R. Co.*, 128 Minn. 365, that it is the latter; and the latter view would seem to be the more logical.

In a recent case, *Kellogg* v. *Winchell* (D. C., 1921), 273 Fed. 745, the court of appeals of the District of Columbia held, when the client undertook to dismiss the attorney after judgment against him and pending an appeal, the contract being for contingent fees, that the attorney had an interest in the case and could prosecute it to final judgment on his own behalf. There are many cases in accord. While it is not always so stated, the basis for such holding should be, logically, the doctrine of equitable assignment,—that is to say, when the attorney agrees to carry on an action for a percentage of the recovery, or for a fixed sum contingent upon success, he becomes assignee of an equitable interest in the cause, if such cause is assignable in his jurisdiction, and is entitled to intervene when necessary to protect his interest. Sometimes the courts so refer to it; at other times they call the attorney's interest a lien. The courts of the same state frequently will call it an equitable assignment in one case and a lien in the next, and permit intervention in both. In the following cases there was an express equitable assignment of a portion of the recovery to the attorney,

and in each it was held good as such: *Gulf, Colorado & Santa Fe R. Co.* v. *Miller,* 21 Tex. Civ. App. 609; *Schubert* v. *Herzberg,* 65 Mo. App. 578; *Dupree* v. *Bridgers,* 168 N. C. 424. In *Terney* v. *Wilson,* 45 N. J. L. 282, an express agreement that the attorney was to have a lien on the recovery was said to amount to an equitable assignment. 2 THORNTON ATTORNEYS AT LAW, 734-5. But other courts say that the contingent fee contract is of itself an equitable assignment. In the following cases the above conclusion was reached without express words of assignment: *Cain* v. *Hockensmith Wheel & Car Co.,* 157 Fed. 992; *Potter* v. *Ajax Mining Co.,* 22 Utah 273; *Sivley* v. *Sivley,* 96 Miss. 134; *Weeks* v. *Wayne Circuit Judges,* 73 Mich. 256; *Johnson* v. *McCurry,* 102 Ga. 471; *Kern* v. *Chicago, M. & P. S. R. Co.,* 201 Fed. 404; *Burkhart* v. *Scott,* 69 W. Va. 694; *Phillips* v. *L. & N. R. Co.,* 153 Fed. 795; *Griggs* v. *Chicago, R. I. & P. R. Co.* (Neb., 1920), 177 N. W. 185; *Middlestadt* v. *City of Minneapolis,* 147 Minn. 186. In the following cases the attorney's interest was called a lien, but he was allowed to intervene to protect that interest: *Fuller* v. *Lanett Bleaching Co.,* 186 Ala. 117; *Wait* v. *Railroad,* 204 Mo. 491; *Corson* v. *Lewis,* 77 Neb. 449; *Schutt* v. *Bush,* 210 Mich. 495; *Payton* v. *Wheeler,* 13 Ga. App. 326. But in *Knipe* v. *Wheelehan,* 160 N. Y. Supp. 1012, while it was recognized that the attorney had a lien he was not allowed to continue the action in his own behalf. It is denied by some authorities that there can be an equitable assignment without express words of assignment. *Stearns* v. *Wollenberg,* 51 Ore. 88; *Howard* v. *Ward,* 31 S. D. 114. And in many jurisdictions it is denied that a contingent fee contract, either with or without special words of assignment of a portion of the recovery, gives any interest, legal or equitable, in the cause of action. *Weller* v. *Jersey City, etc., Ry.,* 68 N. J. Eq. 659; *Gillette* v. *Murphy,* 7 Okla. 91; *Nichols* v. *Orr,* 63 Colo. 333. See, further, 21 C. J. 343; 4 CYC. 49; 4 CYC. 1022; WEEKS, ATTORNEYS AT LAW (Ed. 2), Sec. 355; 8 MICH. L. REV. 328.

It is submitted that the view that an attorney has an interest in the civil cause from its institution is sound. The objection to putting any obstacle in the way of compromise is recognized, but since we allow the contingent fee contract, the policy of leaving the attorney who has expended his time, skill and money in the cause to the caprice of a fickle-minded client who purposes to settle for "a song," in utter disregard or direct fraud of the attorney's rights, does not appeal to one's sense of fairness, nor is it conducive to the smooth and efficient administration of justice. As was said in *Weeks* v. *Wayne Circuit Judges, supra,* "It is true that courts look with favor upon a compromise and settlement made by the parties to a suit with the consent of all parties concerned, to prevent the vexation and expense of further litigation, but the rule only applies where the rights and interests of all the parties concerned, both legal and equitable, have all been respected, and in good faith observed. Parties cannot assume that attorneys have no rights, without inquiry."

There is an unmistakable tendency in the direction of affording greater protection to attorneys under contingent fee contracts, which tendency is shown both in legislation and decision. Perhaps a good "safety valve" is

to be found in the suggestion of the Wisconsin court, *Gowran* v. *Lennon*, 154 Wis. 566, that the attorney should be allowed to go on with the suit, after the client's attempted compromise, only when the client is unable at that time to settle the attorney's claim for fees. Undoubtedly, there are some cases in which public policy so strongly demands an absolute right on the part of the client to settle regardless of his attorney's wishes, that nothing can be permitted to stand in the way. Such, for instance, are cases involving marital differences, etc. In such cases the contract for contingent fees might be deemed valid if it were to be considered as carrying an implied condition subsequent to the effect that the client can settle with his opponent at any time and thus discharge the contingent fee contract with the attorney.

D. H. B.

CONTINUING TRESPASS AND REPEATED WRONG.—The case of *Amstutz* v. *King et al.*, recently decided in the supreme court of Ohio, shows the difficulties under which the courts are laboring in their efforts to get away from the conclusions of the "strong" decisions on the question of law indicated in the title. This case has been reported without opinion, and therefore will not be published in the Ohio State Reports until the bound volume is put out. It is understood that it is to appear in Volume 102, Ohio State Reports. The notation of the court is as follows: "This case is affirmed on the authority of *Gillette* v. *Tucker*, 67 Ohio St. 106 (1902), and *Bowers* v. *Santee*, 99 Ohio St. 361 (1919)." The facts in the case were apparently undisputed in the lower court. The petition of the plaintiff alleged that she employed Dr. King and Dr. Shuffield to perform an abdominal operation on her, on March 9, 1916. *All relationship between these physicians and the patient ceased soon after the operation.* On September 3, 1917, a gauze sponge passed from her body, having been left in the abdomen at the time of the operation. The petition was filed April 30, 1918. By the law of Ohio, "Action for malpractice * * * shall be brought within one year after the cause of action thereof accrued." G. C. 11225. The petition was demurred to on the ground that the statute of limitations had run. The lower court sustained the demurrer and judgment was rendered against the plaintiff. The supreme court has recently affirmed the judgment of the lower court, four members of the court concurring and three judges dissenting.

As the case is reported without opinion, we are thrown back upon the two cases cited as precedents to determine the theory of the decision. The case of *Gillette* v. *Tucker* (1902), 67 Ohio St. 106, is identical in its physical facts with the instant case. In each case the surgeon in charge left a sponge in the wound when the incision was closed. The important juridical fact which differentiates the cases is found in the words italicized above; namely, that in the last case the professional relations between the plaintiff and defendant ceased soon after the time of the operation, while in the earlier case such a relation continued up to a point of time within the year before suit was brought. The case of *Gillette* v. *Tucker* was originally decided by an evenly divided court, thus affirming the decision of the circuit court. This decision was in favor of Mrs. Tucker, the patient, who claimed to have been